TIMBALAN MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

v.

LIAU NYUN FUI

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 01-69 OF 1989]
10 DECEMBER 1990

ADMINISTRATIVE LAW: *Restriction order - Deprivation of personal liberty - Unreasonable delay in issue of restriction order - No statutory time frame - Proper test - Convenient speed - Onus - Restricted Residence Enactment Cap. 39 s. 2 - Federal Constitution Article 5(1) - The Interpretation and General Clauses Ordinance 1948 s. 38.*

On 27 January 1989 the first appellant issued an order for the arrest and detention of the respondent under s. 2(i) of the Restricted Residence Enactment (the Enactment) on the ground that the respondent was a promoter of an illegal four digit lottery in Sandakan. On 6 May 1989 the respondent was arrested and detained; however a restriction order, restricting the respondent to Tapah for three years was issued only on 17 June 1989. On 18 June 1989, the respondent was brought to Tapah.

The Judicial Commissioner held that the restriction order of 17 June 1989 had not complied strictly with the law and that there was no justification for detaining the respondent from 7 May 1985 to 17 June 1989. The 1st appellant affirmed an affidavit on 16 October 1989 (the said affidavit) stating that he was satisfied that it was not necessary to hold an enquiry under s. 2(i) or further enquiry under s. 2(ii). The appellants are appealing against an order of the Judicial Commissioner declaring that the order of the first appellant restricting the respondent to BT was null and void. The principal issue before the Court is the validity of the continued detention of the respondent for the period commencing the day after the arrest up to the date of the issue of the restriction order on 17 June 1989.

Held:

[1] The fundamental principle is that no person shall be deprived of his personal liberty save in accordance with law (see art. 5(1) of the Federal Constitution).

[2] As there was no time frame stipulated in the Enactment under s. 38 of the Interpretation and General Clauses Ordinance 1948, anything which should be done must be done with all convenient speed - what constitutes convenient speed would depend on the circumstances of each case.

[3] The correct test to be applied is not on the basis of unreasonable delay but convenient speed. The Judicial Commissioner's approach, based on the principle of unreasonable delay, is not correct. The proper question is whether the first appellant had made the restriction order with all convenient speed. Strictly it was for the respondent to show that the first appellant had not so acted and not for the first appellant to provide an explanation acceptable to the Court.

[4] In making his decision not to hold a further enquiry, the appellant only scrutinised the information and documents, presumably in respect of those he already had in his possession at the time he issued the order for the plaintiff's arrest and detention; there was nothing to show that he caused further statements to be recorded or further documents to be taken possession of after the order under s. 2(i). If the Minister had stated in the affidavit as to the fact that investigation had to be made and various statement had to be recorded and all these had to be effected in Sabah, the onus would have rested on the person contending that the Minister had not so proceeded to satisfy the Court that the Minister had not acted with convenient speed.

[5] Notwithstanding the error in the Judicial Commissioner's approach, in the particular circumstances of this case and taking into account the affidavit evidence, he had not arrived at a wrong decision.

[Appeal dismissed.]

Cases referred to:

Aminah v. Superintendent of Prison, Pengkalan Chepa [1968] 1 MLJ 92
Assa Singh v. Menteri Besar, Johore [1969] 2 MLJ 30
Andrew s/o Thamboosamy v. Superintendent of Pudu Prison, Kuala Lumpur [1976] 2 MLJ 156
Timbalan Menteri Hal Ehwal Dalam Negeri v. Cheow Siong Chin [1987] CLJ (Rep) 393
Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors. [1977] 2 MLJ 108
PP v Koh Yoke Koon [1988] 1 CLJ (Rep) 269
Phua Hing Lai v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. [1990] 1 CLJ (Rep) 238

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 3
Federal Constitution, art. 5(1)
Interpretation Act 1967, s. 54(2)
Interpretation and General Clauses Ordinance 1948, s. 38
Restricted Residence Enactment (FMS Cap 39), ss. 2(i), (ii), 3(i), (ii)

For the appellants - Suriyadi b. Halim Omar, SFC
For the respondent - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Abdul Hamid Omar LP:

This was an appeal by the appellants - Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia, Ketua Polis Negeri Perak, Ketua Polis Daerah, Batang Padang, Perak and the Government of Malaysia, against the order made by Ong See Seng, JC declaring the order by the Timbalan Menteri Hal Ehwal Dalam Negeri (Timbalan Menteri) restricting the plaintiff to Bandaran Tapah, Daerah Batang Padang, Perak to be null and void and of no effect.

We heard the appeal and dismissed it. We indicated that we would give a written decision at a later date. We do so now.

The appellants' grounds of appeal were set out in the memorandum of appeal as follows:

1. The learned Judicial Commissioner has erred in law and in fact in holding that there has been unreasonable delay in the issue of the restriction order.

2. The learned Judicial Commissioner has erred in concluding that there is no evidence before the Court as to why the order of restriction could not be issued earlier than 17 June 1989.

3. The learned Judicial Commissioner has erred in ruling that encl. 8 should be disregarded and has failed to scrutinise fully the evidence adduced in Court.

Briefly the facts are that on 27 January 1989 the Timbalan Menteri issued an order for the arrest and detention of the plaintiff Liau Nyun Fui pursuant to s. 2(i) of the Restricted Residence Enactment Cap. 39 (the Enactment) on ground that he (the plaintiff) was a promoter of illegal 4 Digit Lottery in Sandakan. The Timbalan Menteri was satisfied it was not necessary to hold an enquiry under s. 2(i) of the Enactment as upon written information and documents he had reasonable grounds for believing that the plaintiff should he required to reside in another area, namely Bandaran Tapah, Daerah Batang Padang, Perak.

On 6 May 1989 the plaintiff was arrested and detained at Kota Kinabalu, Sabah. On 17 June 1989 the Timbalan Menteri issued a restriction order under s. 2(ii) of the Enactment restricting the plaintiff to Bandaran Tapah for a period of three years commencing 17 June 1989. The order was served on the plaintiff at Kinabalu. On 18 June 1989 he was transferred to Bandaran Tapah.

The learned Judicial Commissioner stated that the plaintiff's case rested on two grounds, namely, (1) the restriction order restricting the plaintiff to Bandaran Tapah on 17 June 1989 was not complied with strictly and (2) there was no justification for a continued detention of the plaintiff for the period commencing 7 May 1989 to 17 June 1989.

As for the first ground, the learned Judicial Commissioner said that Mr. Karpal Singh did not press it in view of the explanation given by Ag. A.S.P. Yap Hock Lee in his affidavit affirmed on 13 September 1989.

As for the second ground, the learned Judicial Commissioner was of the view that:

> the arrest and detention of the plaintiff on 6 May 1989 and his continued detention until 17 June 1989 had to be in accordance with the law.

The learned Judicial Commissioner found that there was no evidence before him as to why the restriction order could not be issued earlier than 17 June 1989 considering the fact that the plaintiff had been in detention since 6 May 1989. In arriving at his finding, he considered a number of authorities *inter alia Assa Singh v. Menteri Besar, Johore* [1969] 2 MLJ 30; *Andrew s/o Thamboosamy v. Superintendent of Pudu Prison, Kuala Lumpur* [1976] 2 MLJ 156; *Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors.* [1977] 2 MLJ 108; *Timbalan Menteri Hal Ehwal Dalam Negeri v. Cheow Siong Chin* [1987] CLJ (Rep) 393; and *PP v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269.

The first three are Federal Court decisions while the last two are decisions of this Court. A common thread which runs through these cases is the fundamental principle that no person shall be deprived of his personal liberty save in accordance with law (see art. 5(1) of the Federal Constitution).

In the instant case the learned Judicial Commissioner concluded that there was an unreasonable delay in the issue of the restriction order for which there was no explanation acceptable to the Court.

He referred to the affidavit by the Timbalan Menteri affirmed on 19 October 1989 where the Timbalan Menteri stated he was satisfied it was not necessary to hold an enquiry under s. 2(i) or further enquiry under s. 2(ii) of the Enactment.

In this appeal there was no dispute as to the validity of the order of arrest and detention but what is being challenged is the validity of the continued detention of the plaintiff for the period commencing the day after the arrest up to the date of the issue of the restriction order on 17 June 1989.

At the inception of the hearing in the Court below Mr. Karpal Singh submitted that there was no justification for the unreasonable delay in the issue of the restriction order on 17 June 1989 as a period of six weeks had elapsed after the plaintiff had been arrested and detained.

The plaintiff's case was that there was unreasonable delay and the Timbalan Menteri must therefore provide on explanation acceptable to the Court. A failure to do so would render the detention illegal and the order null and void.

The Senior Federal Counsel appearing for the defendants argued that it was for the plaintiff to satisfy the Court that his detention under s. 2(i) of the Enactment was illegal. He submitted that the Timbalan Menteri was not obliged to issue the restriction order immediately as Form A in the Schedule to the Enactment clearly states that detention shall be until such further order from the Minister. He further submitted that an investigation had to be carried out and various statements had to be recorded and all that had to be done in Sabah.

At this point, it is useful to summarise the learned Judicial Commissioner's finding as follows:

(a) that the arrest and continued detention of the plaintiff must be in accordance with law;

(b) to be in accordance with law, there should not be any unreasonable delay in the issue of the restriction order after the arrest and detention:

(c) that in this case there was no reason why the restriction order could not be issued earlier as the plaintiff was in detention;

(d) that there was in this case an unreasonable delay;

(e) there was no explanation acceptable to the Court for the delay;

(f) that in view of the foregoing the plaintiff's restriction on the authority of the restriction order issued by the Timbalan Menteri was null and void and of no effect;

(g) that the plaintiff was not obliged to comply with the restriction order.

It is to be observed that the learned Judicial Commissioner did not specifically decide whether the detention of the plaintiff during the relevant period was rendered unlawful. All that he said was that there was unreasonable delay on the issue of the restriction order and then proceeded to declare the restriction order null and void and of no effect.

It is also to be observed that the learned Judicial Commissioner had placed some reliance on the decision of this Court in *P.P. v. Koh Yoke Koon* (*supra*) and was apparently swayed by the decision of V.C. George J in *Teoh Lean Fatt v. Timbalan Menteri Hal Ehwal Dale Negeri & Ors.* (unreported) Hgt. Ct. O.S. No. 31-379-88. In that case V.C. George J held that:

> Although s. 2 does not prescribe time limit, it cannot but be that each of the various steps to be taken pursuant to this section and the implementation of each of the consequential orders made pursuant thereto had to be effected within a reasonable time.

In *Koh Yoke Koon's* case the respondent (Koh) was arrested under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Under s. 3 of that Ordinance a person arrested and detained pending enquiries may be detained in police custody for a period not exceeding sixty days. The sixty days expired on 13 December 1986. The respondent was however detained in the Muar Police Station until sometime the morning of 16 December. The Court held that under the detention order the respondent was to be detained at the Pulau Jerajak Rehabilitation Centre and nowhere else and therefore the period 14 December 1986 until the morning of 16 December the respondent could not be said to be in lawful custody or detention.

In that case the Court observed that a detention not in accordance with law is inconsistent with the fundamental right guaranteed under art. 5(1) of the Constitution. The Court further observed that:

> where a law deals with detention, there are abundance of authorities to show that the provision of such a law must be construed strictly and in the case of doubt the Court should lean in favour of the subject. (*Andrew s/o Thamboosamy v. Superintendent of Pudu Prison, Kuala Lumpur* (*supra*).

It is significant to note that in the instant case we are dealing with a different Enactment and therefore special attention must be directed to the provisions of that Enactment. It is pertinent to note that what is said to be unlawful here is the detention subsequent to the arrest and detention order under s. 2(ii) of the Enactment.

The learned Judicial Commissioner was of the view that the Timbalan Menteri had no reason to delay making the order under s. 2 (ii) and since he did, the onus to explain the delay was on the Timbalan Menteri to show that the delay was not unreasonable. This the learned Judicial Commissioner said the Timbalan Menteri had failed to do.

First the law. We refer to s. 2(i) and (ii) of the Enactment which for convenience is reproduced below:

> 2. (i) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim or should be prohibited from entering into any particular district or districts or mukim or mukims the minister may issue an order in one of the forms in the Schedule for the arrest and detention or, if he is already in prison, for the detention of such person.
>
> (ii) The Minister thereafter after such further enquiry as he may deem necessary may make an order in the Form in the schedule that from a date to be stated in such order, such person do reside in such district or mukim as may be specified in the order or do not enter into such district or districts or mukim or mukims as may be so specified.

In order to construe the purport and effect of s. 2(ii) it is essential that consideration be given to the decision of this Court in *Phua Hing Lai v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1990] 1 CLJ (Rep) 238, where the Chief Justice, Malaya delivering the judgment of the Court had this to say:

> Section 3 of the Enactment provides for the implementation of an order made under s. 2(ii) For convenience the whole of s. 3(i) and 3(ii) are reproduced below:
>
> 3.(i) When any such order as is referred to in s. 2 subs (ii) or s. 2A has been made with reference to any person, he shall be taken before the officer-in-charge of the prison in which he is detained and the officer-in-charge shall inform him of the terms of the order and shall deliver to him a copy thereof and shall require him to state the place in which, consistently with the terms of the order, he desires in the immediate future to reside.

(ii) As soon as may be after action has been taken under subs. (1), the officer-in-charge shall hand over the person to whom the order relates together with a warrant of release in the Form in the Schedule to any Police Officer appointed by the Chief Police Officer to receive him, and the person shall thereupon be conveyed under police escort to the place wherein he states he wishes to reside and shall there be released.

It can immediately be observed that there is no time frame given in s. 3(i) of the Enactment. Since no time is prescribed then according to s. 38 of the Interpretation and General Clauses Ordinance 1948 (similar provision also found in s. 54(2) of the Interpretation Act 1967), then anything which shall be done shall be done with all convenient speed.

There is however a time frame given by s. 3(ii) of the Enactment imposed by the words 'as soon as may be' after action has been taken under subs. (i) appearing in that subsection. The words 'as soon as may be' means as nearly as may be reasonable in the circumstances of the case. See also *Aminah v. Superintendent of Prison, Pengkalan Chepa* [1968] 1 MLJ 92.

Whoever caused the delay must explain the delay; and it is for the Court to decide whether the delay is reasonable under the circumstances.

Turning to the present case, it seems clear that a time frame is not prescribed under s. 2(ii) of the Enactment and the Timbalan Menteri cannot therefore be said to be imposed with an obligation to make a restriction order within a specified time. The word "thereafter" used in subsection (ii) of the Enactment clearly connotes that the Timbalan Menteri may make a restriction order "thereafter", that is, some time after making the order of arrest and detention, after such further enquiry he may deem necessary.

Two distinct situations would therefore arise where a restriction order is issued and that is:

(1) after a further enquiry (if further enquiry is deemed necessary):

(2) after no further enquiry is deemed necessary.

In the light of the judgment in *Phua Hing Lei's* case the position in law seems to be that when no time frame is prescribed then anything that shall be done under s. 2(ii) shall be done with all convenient speed. Accordingly in respect of situation (l), the further enquiry and the issue of the restriction order shall be effected with all convenient speed. What constitutes convenient speed would depend on the circumstances of each case. In respect of situation (2), where the Timbalan Menteri does not deem it necessary for any further enquiry he ought to proceed thereafter, that is, after the detention, to make the restriction order with all convenient speed.

The correct test to be applied therefore is not on the basis of unreasonable delay but convenient speed.

The learned Judicial Commissioner determined the question before him on the basis of unreasonable delay. This was not a proper approach. The question that was before him was whether the Timbalan Menteri in the particular circumstances of that case had acted with all convenient speed in making the restriction order. Strictly it was for the respondent to show that the Timbalan Menteri had not so acted and not for the Timbalan Menteri to provide an explanation acceptable to the Court.

Notwithstanding that the learned Judicial Commissioner had erred in his approach in determining the question before him, we are unable to say that in the particular circumstances of this case the learned Judicial Commissioner had arrived at a wrong decision in particular having regard to the affidavit evidence before the Court.

The Timbalan Menteri in his affidavit affirmed on 9 October 1989 averred as follows:

> 5. In reply to para. 5 of the said affidavit, Z admit that I issue the order dated on 17 June 1989 which is annexed herewith and marked as Exhibit 'MIMA3'.
>
> 6.(1) After carefully scrutinising the relevant written information and documents, I was satisfied that it was not necessary to hold an inquiry under s. 2(ii) of the said Enactment.
>
> (2) After being satisfied from the said information and documents that there were reasonable grounds for believing that the plaintiff should be required to reside in Bandaran Tapah, Daerah Batang Padang, Perak Darul Ridzuan, I made the said order.

The Timbalan Menteri had made a firm decision that it was not necessary to hold any further enquiry under s. 2(ii) of the Enactment. All he did was to scrutinise the information and documents, presumably in respect of those he already had in his possession at the time he issued the order for the plaintiff's arrest and detention. There was thus nothing to show that the Timbalan Menteri had to scrutinise new information or documents other than those he had already scrutinised before making the order under s. 2(ii). There was also nothing to show that he caused further statements to be recorded or further documents to be taken possession of after the order under s. 2(i). Why therefore did he have to wait six weeks to make the restriction order?

The learned Senior Federal Counsel argued that the Timbalan Menteri was not obliged to issue the restriction order immediately after the order of arrest and detention under s. 2(i) We do agree indeed we are not about to say that he was so obliged. He further argued that investigation had to be made and various statements had to be recorded and all these had to be effected in Sabah. If that had been the case all that was needed for the Timbalan Menteri to do was to say so in the affidavit. If he had done that the onus would have rested on the person contending that the Timbalan Menteri had not so proceeded to satisfy the Court that the Timbalan Menteri had not acted with convenient speed.

In consideration, it is our judgment that though the learned Judicial Commissioner had been erroneous in his reasons for the decision the decision itself was not an erroneous decision. For the reasons stated we dismissed the appeal with costs.

Also found at [1991] 1 CLJ 458